IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CONTEMPT PETITION NO.25 OF 2002

IN

SUIT NO.5045 OF 2000

Mercury Laboratories Pvt.Ltd. ...Petitioners

v/s

Mercury Healthcare Ltd. and ors. ...Respondents

Dr V.V. Tulzapurkar with Mr V.R. Dhond, Mr H.W. Kane and Mr Rahul Kadam for Petitioners.

Mr Milind Vasudeo with Mr Darshan Mehta and Ms Priya Ranade i/b M/s Dhruve Liladhar and Co. for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 24TH JANUARY 2007.

P.C. :-

1. The present contempt petition has been filed alleging breach of the order dated 20th December 2000 passed by this Court in suit No.5045 of 2000. Perusal of the order shows that the Court has disposed of the suit in terms of the consent terms filed by the parties. By the consent terms, the suit was decreed in terms of prayer clauses (a), (b) and (d) of the plaint. Prayer clauses (a), (b) and (d) read as under :-

> "(a) that the defendants by themselves, their servants, dealers and agents be restrained by a perpetual order and injunction of this Hon'ble Court from infringing the plaintiffs' trade mark 'ERGACAP' label registered under No.214969 in Class 5 by using in relation to medicinal and pharmaceutical preparation the trade mark 'ARGACARE' or the label as shown in Exh.'F' hereto or any other trade mark deceptively similar to the plaintiffs' registered trade mark;
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> (b) that the defendants by themselves, their

servants, dealers and agents be restrained by a permanent order and injunction of this Hon'ble Court from using the trade mark 'ARGACARE' and the label and the word mark 'MERCURY' and the monogram as shown in Exh.'F' hereto or any other trade marks deceptively similar to the plaintiffs' trade marks 'ERGACAP', the label, word mark 'MERCURY' or the monogram shown in Exhs.'B', 'C' and 'E' hereto in relation to medicinal and pharmaceutical preparations so as to pass off their medicinal and pharmaceutical as and for the medicinal and pharmaceutical preparation of the plaintiffs;

(d) that the defendants be ordered and directed to deliver up to the plaintiffs for destruction the impugned trade marks, labels and the containers shown in Exh.'F' hereto and all goods, labels, cartons, logos, advertising material, packing material and other literature bearing the mark 'ARGACARE, the impugned label, word 'MERCURY' or the monogram;"

. In the present petition, it is alleged by the petitioners that the respondents have committed willful disobedience of the decree passed by this Court by continuing to use the word mark 'MERCURY' in relation to their pharmaceutical preparations. According to the petitioners, by prayer clause (b), permanent injunction has been granted restraining the respondents from using the word mark 'MERCURY' as shown in Exh.'F' in relation to medical and pharmaceutical preparations. Perusal of the document at Exh.'F' shows that on the carton containing the capsules, work mark 'MERCURY' was being used at two places. Firstly, it was used to show that the product is manufactured by 'MERCURY'. It was mentioned on the container 'MERCURY'S ARGACARE', below it it was mentioned 'Manufactured in India by Mercury Health Care'. According to the petitioners therefore, by the decree granted in terms of prayer clause (b) of the plaint, the respondents were restrained from using the work mark 'MERCURY' in relation to the pharmaceutical and medicinal preparations anywhere on the carton. According to the petitioners, in the month of September 2001, the petitioners learnt that in violation of the decree passed by this Court, the respondents continued to use the word mark 'MERCURY' on their carton containing capsules in the following fashion :-

. "Marketed by Mercury Health Care Pvt.Ltd."

. The petitioners therefore issued notice calling upon the respondents to surrender the carton which was in breach of the decree passed by the Court, but the respondents declined to do so, therefore, this contempt petition has been filed.

2. On behalf of the respondents, reply dated 17th July 2002 was filed by the respondent No.4 claiming to be the Director of the respondent No.1 Company and being conversant with the facts of the case. The defence in short is that 'MERCURY' is the corporate name of the respondent No.1 Company and therefore they are entitled to use it and that the decree passed by this Court does not restrain them from mentioning the name 'Mercury Health Care Pvt.Ltd.' because it is their corporate name. The respondents have claimed that they have not disobeyed the order made by this Court. The respondents have also not tendered even conditional apology though they have filed affidavit in this petition. At the hearing, the learned counsel appearing for respondents stated that among all respondents, it is only respondent No.5 who is looking after the affairs of the respondent No.1 Company and therefore if this Court comes to the conclusion that the order of this Court has been breached by the respondents, then it is only respondent

No.5 who can be held liable.

3. The learned counsel appearing for petitioners submits that the order dated 20th December 2000 passed by the Court is clear, that the suit has been decreed in terms of prayer clauses (a), (b) and (d). According to the learned counsel, order in terms of prayer clause (b) clearly restrains the respondents from using the word mark 'MERCURY' in relation to medicinal and pharmaceutical preparations. The learned counsel submits that prayer clause (b) specifically refers to Exh.'F' of the plaint. Ex.'F' of the plaint shows that the word mark 'MERCURY' was being used by the respondents at two places of the carton as indicated above showing that the 'MERCURY' is the manufacturers of the product. The learned counsel submits that the decree passed by this Court restrains the respondents from using the word mark 'MERCURY' at any place on the carton which contains medicinal and pharmaceutical preparations. The learned counsel further submits that on the carton, copy of which is at Exh.'F' of the plaint, 'MERCURY' was mentioned as the name of the manufacturer and the justification given is that because Mercury Health Care is manufacturing this pharmaceutical preparation, word 'MERCURY' has to be used on the carton. By consent of the parties, in this situation, the Court passed the decree in terms of prayer clause

(b). Perusal of the carton which is in the market in relation to which this contempt petition has been filed shows that the carton does not show that the product is manufactured by Mercury Health Care but now the name of Mercury Health Care is shown as marketing agent of the product. The learned counsel also invited my attention to the affidavit dated 19th September 2002 filed on behalf of the respondents wherein according to the learned counsel, the respondents themselves have admitted that even the carton mentioning the corporate name of the respondents was also destroyed pursuant to the decree passed by this Court. According to the learned counsel therefore, in these circumstances, there is no doubt that the respondents have willfully disobeyed the order made by this Court. The learned counsel appearing for respondents, on the other hand, submits that the decree passed in terms of prayer clause (b) restrains the respondents from using the word mark 'MERCURY'. According to the learned counsel, so far as Exh.'F' of the plaint is concerned, the word mark 'MERCURY' was mentioned alongwith the name of the product and the order of permanent injunction relates to only that word mark. It does not at all relate to that part of the carton at Exh.'F' which mentions the name of Mercury Health Care as the manufacturers of the product. The learned counsel by referring the order passed by the Regional Director under the Companies Act submits that

the order of this Court does not restrain the respondents from using the word 'MERCURY' as their corporate name and it also does not prevent them from using the word 'MERCURY' to indicate that the product is manufactured by Mercury or is marketed by Mercury. The learned counsel submits that according to the petitioners, the respondents have been restrained by the decree of this Court from using the word 'MERCURY' as their corporate name. According to the respondents therefore, the decree does not restrain the respondents from using word 'MERCURY' as their corporate name. In the submission of the learned counsel, if the conduct of the petitioners after the decree was passed is changed, it is clear that they have also understood the order and that the order does not restrain the respondents from using the word 'MERCURY' as their corporate name. The learned counsel also submits that because the formula belongs to Mercury Pharmaceuticals, on the product and the carton in which the product is contained, it has to be indicated that Mercury Pharmaceuticals are the owners of the product.

4. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the decree has been passed by consent of the parties in terms of prayer clause (b) of the plaint. Perusal of prayer clause (b) of the plaint

shows that it permanently restrains the respondents from using the word mark 'MERCURY' as shown in Exh.'F of the plaint. Perusal of the document at Exh.'F' shows that on the carton, the word mark ' MERCURY' was used at two places as indicated above and therefore it is clear that by the order passed in terms of prayer clause (b), he respondents are restrained from using the word mark 'MERCURY' at both the places. The only change that the respondents have now made is on the carton they are mentioning that the product is manufactured by Sarita Pharmaceuticals Pvt.Ltd. and that it is marketed by Mercury Healthcare Pvt.Ltd. In my opinion, the order passed in terms of prayer clause (b) of the plaint is clear that the word mark 'MERCURY' cannot be used by the respondents in relation to medicinal and pharmaceutical preparations either as the name of manufacturer of the product or as the name of marketing agent. By the consent decree, the respondents were directed to destroy the containers having infringing material. In paragraph 11 of the affidavit dated 19th September 2002, the respondents have stated that :-

> "....as per the order and decree dated 20th December 2000 passed by His Lordship Mr Justice F.I. Rebello, the respondent Company had discontinued using the impugned trade mark and had also destroyed all the materials

containing impugned trade marks, labels and containers as shown in Exh.'F' to the plaint and all the goods, labels and other literature bearing the mark 'AGRACARE' the impugned label containing word 'MERCURY' and the impugned trade mark 'Mercury' in the form of and as part and parcel of their corporate name which was prominently exhibited upon all the goods, advertisement etc. of the 1st respondent and which according to the petitioners' allegation is being passed off as and for the petitioners' goods."

. It is clear from the above quoted statements that the respondents clearly understood that pursuant to the decree passed by this Court the respondents are restrained from using their corporate name 'Mercury' in relation to the medicinal and pharmaceutical preparations. In my opinion, by merely stopping to mention the name 'Mercury Health Care' as manufacturer of the product and now showing as the marketing agent, the respondents cannot claim that they have not disobeyed the order made by this Court. The order clearly restrains them from using the word mark 'MERCURY' in relation to medicinal and pharmaceutical preparations. It does not restrain them from continuing their corporate name 'Mercury', they can continue to use

’Mercury’ as their corporate name but they cannot mention it on the carton which contains medicinal and pharmaceutical preparations. In my opinion, the statement made by the respondents in their sur-rejoinder quoted above clearly takes the matter beyond any argument and it clearly shows that by the decree even according to the respondents, they were restrained from using their corporate name ’mercury’ on the carton containing the medicinal and pharmaceutical preparations. It is an admitted position that the respondents continued to use the word mark ’Mercury’ on their container and therefore, in my opinion, there is a clear breach of the order committed by the respondents. So far as the submission that the respondents bonafide belief that the decree does not restrain them from mentioning their corporate name on the carton is concerned, had that been the bonafide belief, in my opinion, after the contempt petition was filed alleging that they cannot do so pursuant to the order, in any case, after show cause notice was issued in the petition, the respondents could have applied to the Court which passed the decree, seeking clarification of the order if it was their bonafide impression, but the conduct of the respondents of not taking such steps coupled with a clear statement made on oath in the sur-rejoinder shows that even the respondents were aware that they cannot use the word mark ’MERCURY’ in relation

to the medicinal and pharmaceutical preparations on the cartons as they were doing, but still they continued to do so which shows that they were wilfully and deliberately doing it knowing fully well that the order restrains them from doing so. In my opinion, the respondents are clearly guilty of having committed civil contempt of this Court.

5. So far as the aspect of punishment is concerned, in view of the statement made by the learned counsel appearing for respondents that there is no question of imposing any punishment on respondent Nos.1 to 4 because the respondent No.5 has taken over the entire responsibility, interest of justice would be subserved by directing the respondent Nos.1 to 4 to pay costs. So far as the respondent No.5 is concerned, I have found that the respondent No.5 has wilfully and deliberately disobeyed the order made by this Court. Perusal of provisions of section 12 of the Contempt of Courts Act 1979 shows that a person who is caused of having contempt of the Court can be punished, but the punishment can be remitted on apology being made to the satisfaction of the Court. There is no apology made. Explanation to sub-section (1) of section 12 shows that merely because apology is tendered, qualified or conditional, it cannot be said that it is bonafide. In my opinion, a mere statement at the end of argument by

the learned counsel appearing for respondents that the respondents are willing to tender apology, has to be ignored considering the consistent conduct of the respondents. I asked more than once the learned counsel to indicate to me if there are any mitigating circumstances so far as the aspect of imposing punishment is concerned, the learned counsel though made every effort, was unable to put forth any reason. I find that this is a case where clear and wilfull breach of the order made by this Court is committed, when that order was made by consent of the parties. Really speaking, because respondent No.5 is a lady, that circumstance could have been taken into consideration in so far as the imposition of punishment is concerned, but in my opinion, as a matter of strategy, the respondents have stated that if this Court comes to the conclusion that the respondents have disobeyed the order, then it is only respondent No.5 who is liable though the respondent Nos.2 to 5 are all related. The respondent No.4 is a gentleman and it is he who has filed affidavit in reply in this petition. The statement has been made so that the fact that the respondent No.5, who is lady, could be pleaded in order to pursuade the Court to impose lesser punishment. In this view of the matter, in my opinion, the circumstance that the respondent No.5 is a lady, cannot be taken into consideration for any lesser punishment. Taking overall view of the matter

therefore, considering the consistent conduct of the respondents, in my opinion, the maximum punishment provided by law is liable to be imposed on respondent No.5. The respondent No.5 is therefore sentenced to undergo simple imprisonment for a term of six months with fine of Rs.2,000/-. So far as the respondent Nos.2 to 4 are concerned, they are directed to pay to the petitioners an amount of Rs.10,000/- as and by way of costs of this petition. Petition is disposed off.

6. At the request of the learned counsel appearing for respondents, the order imposing sentence of imprisonment on the respondent No.5 is stayed for a period of four weeks from today.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.